below had failed to give the instructions that he had requested."

On page 4 of this Court's decision in this case there is *stated in part* defendant's exception and objection to the failure of the court to charge the written requests, *but there is stated none of the rulings of the Trial Court thereto.*

We set forth the entire exceptions and objections and the court's rulings thereon, as follows:

"By the Court:

I will hear first from the defendant.

Mr. Miller:

Your Honor, the only exception and request that we would have would be that our written requests that have already been submitted, which Your Honor has considered, I feel confident that it would be needless for me to pick them up and read those that the Court has not charged. That's not necessary is it, sir?

By the Court:

I don't think so. You can just except to all those which I did not give.

Mr. Miller:

That is my intention, sir.

By the Court:

I believe that would be sufficient."

It is respectfully submitted that this Court, in rendering its decision with respect to such requests to charge, overlooked and failed to apply the full context of the objections and exceptions and the court's rulings thereon.

The exceptions and objections to omissions of the Trial Court to charge requests to charge, and the pointing out distinctly of the grounds thereof, as required by Rule 30 of the Federal Rules of Criminal Procedure, *is for the benefit of the trial court* in charging the jury.

When the Trial Court ruled that defendant's counsel need say no more, and stated to such counsel, "you can except to all those (requests to charge) which I did not give." and when counsel stated that was his intention, and the court ruled, "I believe that would be sufficient," such requirements of Rule 30 were met.

It would appear to be an almost conclusive presumption that the lower court in so ruling was fully cognizant of the contents of the requests and the defendant's contentions with respect thereto, as to their applicability to the law and facts of the case.

With respect to the statement above made, that compliance with such provisions of Rule 30 is for the benefit of the trial court, we first cite a case from the Sixth Circuit which applies old Rules 46 and 51. which we believe are substantially consolidated in present Rule 30.

> "Rule 51 should be read in conjunction with Rule 46. The purpose of these rules is to inform the trial judge of possible errors, that he may have an opportunity to consider his rulings and if necessary correct them, and where it appears in the record that the point urged on appeal was called to the attention of the trial court in such manner as to clearly advise it as to the question of law involved, that is sufficient. Sweeney v. United Features Syndicate, 2 Cir., 129 F. 2d 904; Hall v. Aetna Life Insurance Company, 8 Cir. 86 F. 2d 447, 451. In our opinion we should

consider the objection of the appellant to the instruction given."

Williams v. Powers, 6 *Cir.*, 135 *F.* (2*d*) 153, 156

We again reiterate that the Trial Court, in ruling on defendant's objections as it did, ruled that the court was fully cognizant with the requests and defendant's contentions with respect thereto, and that further particularity with respect to pointing out the objections and grounds of complaint was not necessary and was dispensed with; in fact, further particularity after such ruling of the court would have been contrary to and in the face of the Trial Court's ruling.

"We think that in these circumstances, no waiver of the error resulted from any failure to request a cautionary charge. *The objection previously made amply sufficed to make known to the court that these defendants would assert he had erred.* Fed. Rules Crim. Proc. rule 30, 18 U.S.C., does not require a lawyer to become a chattering magpie." (Emphasis added)

U.S. v. Kelinson., 2 *Cir.* 205 *F.* (2*d*) 600, 601, 602

As in the last mentioned case, we respectfully submit that the defendant's objections and the court's ruling thereon "amply sufficed to make known to the judge that (the) defendant would assert he had erred."

In fact, in the instant case, the Trial Court recognized that the defendant was going to contend he had erred, when the court stated "You can just except to all those which I did not give," and counsel stated, "That is my intention, sir."

Further in support of this contention, we cite the following District of Columbia Court of Appeals case:

"In assigning error as to any part of a charge, *or for any omission therefrom*, as for failure to charge in accordance with a request, it is essential

that a distinct objection be stated, with the ground upon which it is based. Mundy v. United States, 1949, 85 U.S. App. D.C. 120,176 F. 2d 32; Felton v. United States, 1948, 83 U.S. App. D.C. 277, 170 F. 2d 153, certiorari denied 335 U.S. 831, 69 S.Ct. 18, 93 L. Ed. 385; United States v. Sutter, 7 Cir., 1947, 160 F. 2d 754. The requirement is for the sound and practical purpose of affording the court an opportunity to make any additions or corrections that may be deemed appropriate before the jury retires to consider of its verdict. Cf. Palmer v. Hoffman, 1943, 318 U.S. 109, 119, 63 S.Ct. 477, 87 L. Ed. 645, 144 A. L. R. 719; Stillwell v. Hertz Drivurself Stations, 3 Cir. 1949, 174 F. 2d 714, 715."

Villaroman v. United States, D.C. Cir., 184 *F. (2d)* 261, 262

We do not wish to burden this brief with repetition of all the argument and authority set forth in our original brief in this case as to the requests being proper and adjusted to the evidence and the defendant's position taken at the trial and the prejudicial effect of failure to charge the requests, and, therefore, respectfully request the Court to refer to such original brief therefor.

However, there are certain facts and authority we wish to point out and emphasize, with the Court's indulgence, with respect to Specification of Error 4 (f) (pertaining to the admitted arrangement or agreement the defendant had with his co-indictee who pleaded guilty and turned State's evidence), and defendant's contention that the court's general charge permitted the jury to find the defendant guilty on his admitted agreement or arrangement.

With respect to this Specification of Error, this Court's decision stated in part, on page 6, as follows:

"We think that appellant's contention is more fanciful than real, and that no prejudice resulted from the failure to give this charge, for the reason that the court's charge when considered as a whole was eminently fair . . . "

To learned jurists and counsel, a lengthy charge in a Federal conspiracy case may read and sound as simple as the story of Little Red Riding Hood, but to the jury, made up of housewives, farmers, businessmen and others not versed in the intricacies of conspiracy law, no contention outside of absurdities should be termed "fanciful" with respect to the influence of a given state of facts upon a juror's mind in arriving at a verdict.

We stated in all sincerity in our original brief, and state here again, that the failure of the court to charge the request set forth in Specification of Error 4 (f) was prejudicial and was calculated to permit the jury to find the defendant guilty for his arrangement or agreement with his co-indictee for the latter to inform the defendant when desirable material would go to salvage for sale, which, though probably unscrupulous and unethical, was not criminal.

Although we submit that this request met all of the rules pertaining to requests, it was timely and adjusted to the evidence and couched in proper language, it did not have to meet such rules.

This request brought to the attention of the court quite forcefully, we submit, the contention of the defendant that the only agreement or arrangement he had with his co-indictee was that as set forth in such request, and the court was bound to charge the same when it was brought to its attention, even without a request.

"Where evidence presents a theory of defense and the court's attention is particularly directed to

it, it is reversible error to refuse to give *any* charge on such theory ((Emphasis supplied)."

Calderon v. U.S. 5 *Cir.*, 279 *F.* 556 (Citing 180 U.S. 356, 361)

"Defendants are indeed entitled to have presented to the jury, by appropriate instructions, their defensive theories, which are supported by the evidence in the case, and failure to submit them when properly requested may constitute reversible error."

Jenkins v. U.S., 5 *Cir.*, 59 *F.* (2*d*) 2, 3

And the Third Circuit has similarly announced this rule as follows:

"Where timely request is made for instructions which correctly propound the law, and which are warranted by the pleadings and evidence, the court must give them unless they are covered by general instructions or by the general charge, and failure so to do requires reversal, unless it is non-prejudicial. (Citing 5 CJS, p. 1155 and eleven Circuit Court cases)"

Gold v. U.S., 3 *Cir.*, 102 *F.* (2*d*) 350

We wish further to re-emphasize the prejudicial error in the failure of the court to charge defendant's request which was set out in Specification of Error 4 (b), and which was as follows:

"Further, in connection with the contention of the Government that A. J. Wright was an accomplice of the defendant, I charge you that you would not be authorized to convict the defendant on the testimony of *Wright alone*, unless you find and determine that Wright's testimony produced the fullest and most positive conviction of the truth, and from

Wright's testimony you are satisfied to a moral and reasonable certainty, and beyond a reasonable doubt, of the guilt of the defendant." (Emphasis added).

We recognize the rule in the Fifth Circuit that no corroboration of an accomplice's testimony is necessary for a conviction, though we respectfully submit this rule is not universal throughout the country.

However, we do believe that it is the universal rule throughout the country that a conviction in a criminal case requires a jury's moral conviction beyond a reasonable doubt before they can convict, whether the evidence is that of an accomplice or otherwise.

The above request was based upon this requirement of moral conviction of the jury and upon the further premise that without the testimony of A. J. Wright no conviction would be authorized, and thus the jury was required to believe Wright's testimony as to the guilt of the defendant beyond a reasonable doubt before they could convict on his testimony alone.

We submit that the failure of the court to charge this request was highly prejudicial and erroneous, for it deprived the defendant of having the jury know that they would have to believe the testimony of a confessed criminal beyond a reasonable doubt before they could convict on it alone.

"Ordinarily the failure of the court to charge that the testimony of an accomplice should be received with great caution is not assignable as error, in the absence of a request so to charge. (Citing cases)

"But it is the better practice to so instruct in any event, and *a refusal to do so when requested is error*. We think the instruction asked was a proper one under the circumstances of this case. Ordinarily, the requirement that the jury should be convinced

beyond a reasonable doubt that the testimony of an accomplice is true would be objectionable and would warrant refusal; *but in the instant case proof of the sale depended entirely upon the testimony of Josephine West, and unless the jury believed that testimony beyond a resonable doubt, they could not properly return a verdict of conviction.* (Emphasis supplied)

Lett v. U.S., 8 *Cir.*, 15 *F.* (2*d*) 686

II.

Errors or Defects in Court's Charge Affecting Substantial Rights of Defendant

A.

Charge on Good Character of Defendant

This Court, in its decision with respect to Specification of Error 1, complaining of the Court's charge on good character of the defendant, held that this specification of error was without merit because no objection or exception was taken to the charge at the trial (as provided by Rule 30 of Federal Rules of Criminal Procedure), and further held that this specification was not one which the Court should on its own motion notice.

We respectfully submit that, although no exception or objection was taken to this charge of the court during the trial, the charge did violate substantial rights of the defendant, and that this Court should take notice of it.

> "In exceptional circumstances, *especially in criminal cases,* appellate courts, in the public interest, may, by their own motion, notice errors to which no exception has been taken, if the errors are obvious or if they otherwise seriously affect the *fairness,*

integrity or public reputation of judicial proceedings. (Emphasis supplied)"

U.S. v. Atkinson, 297 *U.S.* 157, 56 *S. Ct.* 391, 392, 80 *L. Ed.* 555

In the following Fifth Circuit Court of Appeals case this Court held that a similar charge of the trial court was prejudicial, and reversed a conviction because the charge of the court in that case did not authorize good character testimony alone to create a reasonable doubt and therefore authorize an acquittal.

"The court below instructed the jury: . . .
'if the evidence with regard to good character, to good reputation, is sufficient *when considered with all the other evidence in the case to create* in your mind a reasonable doubt of his guilt then it is your duty to acquit him upon *that evidence, including* that of good character.' (Emphasis added) The problem narrows therefore to whether this instruction fairly apprised the jury that in some circumstances' . . . such testimony *alone* . . . may be enough to raise a reasonable doubt of guilt . . . ' (Emphasis added . . .

" . . . On this record, showing a long-time employment with the City of Jacksonville and a life otherwise free from crime or arrests of any nature, we are unable to say that the omission in the judge's charge did not result to Holland's prejudice . . .

"Reversed and remanded for a new trial."

Holland v. U.S. 5 *Cir.,* 245 *F.* (2*d*) 341, 342, 343

It is true that in the last mentioned case the defendant did submit to the court a written request to charge on good character, and his second assignment of error was to the refusal of the court to give the instruction.

We cannot distinguish the prejudice to Holland in the last mentioned case of the trial court in that case failing to charge that good character can engender a reasonable doubt and authorize an acquittal from the prejudice to Tomley in the instant case from the court's failure to so instruct the jury; for we do not believe it can legitimately be said that the prejudice to Holland arose out of the failure of the court to charge a request. The Fifth Circuit Court of Appeals in the Holland case did not hold that the failure to charge the written request was prejudicial to Holland, but that the charge actually given by the court worked the prejudice to Holland.

As a matter of fact, the charge of the court in the Tomley case on good character was more prejudicial to Tomley than the charge of the court to the jury in the Holland case was to Holland. In the Tomley case the trial court deprived Tomley of any benefit whatsoever of the defense of good character when the trial court stated: "In other words, a jury would not be authorized to acquit because of good character"; whereas, in the Holland case the charge of the trial court did not deprive Holland of any defense as to good character, but informed the jury that good character evidence, when considered with all the other evidence, could generate a reasonable doubt; whereas, the true rule is that good character alone may engender a reasonable doubt in some circumstances.

As in the Holland case, Tomley, a man of 49 years of age, has had "a life otherwise free from crime or arrests of any nature."

In the following case from the Third Circuit there does not seem to have been any request to charge filed, nor any objection made.

> "The defense relied heavily upon character testimony in its effort to make the jury believe that the accused rather that (sic) Hutchins was telling the truth. Concerning this type evidence, the court

charged: 'Now, members of the jury, there has been character evidence offered here. You will weigh that character evidence along with all of the other substantive evidence in the case. Character evidence of its own weight could work an acquittal. If, after hearing all of the evidence, you still have a doubt in your mind, and it is a reasonable doubt, character witnesses then coming into play could work an acquital, but again, members of the jury, character is what we are as distinguished from reputation, which is what people know us to be. There are many who walk around prating heavenly praises, but all the while having the heart of the devil himself. So that sometimes we enjoy a reputation until we are found out.' At the end of the charge the court in the presence of the jury agreed to the correctness of an amplifying and corrective statement made by defense counsel to the effect that character evidence is relevant at all stages of their deliberations and may cast such light upon the case as to persuade the jury that the accused should be acquitted." The case was reversed.

U.S. v. Cumberland 3 *Cir.*, 200 *F.* (2*d*) 609, 610

It will be noted that in the last mentioned case, the Cumberland case, the court in its charge to the jury first advised the jury that character evidence alone could work an acquittal, then took it back by disparaging remarks against character evidence. In the instant case the Trial Court advised the jury that character evidence could generate a reasonable doubt of the guilt of the defendant (thus authorizing his acquittal), and then advised the jury that they would not be authorized to acquit the defendant because of good character.

As we read the Cumberland Case, it is a case where the Circuit Court of Appeals, although it is not so stated, took notice of this error under Rule 52 (b).

In the following Third Circuit Court of Appeals case we are unable to determine the status of whether objections were taken at the trial as to the charge on character evidence.

The court in that case stated:

> "The third error, asserted by the appellants . . . relates to the charge of the court below on the part played in the ultimate determination of guilt by the character evidence adduced on their behalf. The jury was instructed as follows:
>
> " 'Some of the defendants have produced what are known as reputation witnesses. The evidence which they gave is valid evidence and must be considered by you with all of the other evidence and may of itself be the basis for a reasonable doubt. But it must not be considered separate and apart from all the other evidence, *nor should reputation evidence alone bear with you against overwhelming evidence indicative of guilt.*
>
> " 'It must be considered with all of the other evidence and weighed with that." (Emphasis supplied.)
>
> "The italicized portion of the quoted charge is attacked here. The argument is that that statement destroys the effect of an otherwise proper charge that the character evidence must be considered along with all the other evidence in the case and when so considered may generate a reasonable doubt."
>
> *U. S. v. Klass*, 3 *Cir.*, 166 *F.* (2*d*) 373, 378, 379

The Third Circuit Court went on to hold that this charge was reversible error.

The charge in the Klass case is almost identical to the charge in the instant case as to the final result; that is, the first

part of the character charge was proper, but then at the end both charges took away from the defendants all the benefit of any character evidence.

We respectfully submit that this charge of the Trial Court on character evidence violated a substantial right of the defendant Tomley and was highly prejudicial to him, and that he is entitled to a new trial because of such prejudicial error.

B.

The court charged the jury as follows:

> "To illustrate a little further, suppose that when we walk down out of this building we should see two men with guns rush into the bank and point their guns at the cashier and take the money out of the vault and run away with it, and that's all we know about that transaction. Well, you couldn't prove that they had got together and agreed, either in writing or orally, that they were going to rob a bank, but we would know that they were in it together, that they were co-operating with each other, that they were acting in concert, and that therefore they understood between themselves what it was they were going to do. That is what an agreement means in connection with a conspiracy case."

True, no exceptions were taken to this charge at the trial, but we respectfully submit that the analogizing of the instant case with one of armed bank robbery as set forth in our original brief, was prejudicial to the defendant Tomley, because it was calculated, at least, to cause the jury to view the evidence in the case as one similar to, and as grave as, armed bank robbery.

Particularly is this true in view of the failure of the court to charge the jury the requests of defendant that it did not

charge, and in view of the fact that the only evidence against defendant Tomley was the testimony of A. J. Wright, who had pleaded guilty and had turned State's evidence.

We respectfully submit that this error is substantial and affected substantial rights of the defendant, and that this Court should take notice of it under Rule 52 (b), and under the authorities cited heretofore.

Respectfully submitted,

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I certify I have served appellee with a copy of the foregoing brief of appellant for a rehearing by delivering a copy to the Hon. Frank O. Evans, United States Attorney in and for the United States District Court for the Middle District of Georgia, Macon Division.

This _____ day of January, 1958.

WALLACE MILLER, JR.,
Attorney for Appellant